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AK ABDUL HAMEED KADER MYDIN

v.

NG SEOK AI

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HIGH COURT MALAYA, PULAU PINANG
BALIA YUSOF WAHI J
[CIVIL APPEAL NO: 12-100-2003]
13 MAY 2009

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TORT: *Negligence - Road accident - Collision between motorcycle and motorcar - Whether Sessions Court Judge erred when he found defendant's version more probable - Whether trial judge should decide on matter on evidence of witnesses and not on his own personal knowledge - Whether a judge in the general exercise of his judicial function was entitled to rely*

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on what was common and public knowledge - Whether plaintiff prejudiced - Whether there was sufficient reason to interfere with decision of the SCJ

This was an appeal by the plaintiff (appellant) against the decision of the Sessions Court Judge (SCJ) dismissing his claim with cost. The plaintiff's claim arose from a road accident involving a motorcycle ridden by him and a motor car driven by the defendant (respondent). According to the plaintiff's version, he was riding his motorcycle heading towards Butterworth intending to go to his friend's house at the PPC Quarters. Upon reaching Jalan Bagan Ajam he slowed down his motorcycle and rode to the right towards the center of the road. Suddenly a car knocked into the rear of his motorcyle and he fell. He blacked out and realised later that he was in hospital. About three months later, he lodged a police report. SP1, an investigating officer from the IPB Butterworth gave evidence as to the damages on the motorcycle and the car. The only damage to the car was a broken front number plate while the motorcycle's rear number plate was slightly broken and the front left windshield was broken. The defendant gave evidence to the effect that at the time of the accident it was raining and while driving his car he saw an object on the road and despite braking, he ran over the object which later turned out to be a crash helmet. The defendant denied knocking into the plaintiff's motorcycle. The SCJ, after considering the totality of the evidence and upon his observation of the witness, concluded that the defendant's evidence was more probable. In this appeal, the

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main ground of complaint by the plaintiff was that the SCJ had imported his own knowledge regarding a certain fact in the matter, namely, the location of the PPC Quarters. According to the plaintiff, the SCJ had drawn attention to the fact that he knew the PPC Quarters was located on the left hand side of the road as shown in the sketch plan and not on the right as stated. The plaintiff contended that the trial judge should decide the matter on the evidence of witnesses tendered in court and not on his personal knowledge. It was further submitted that the plaintiff had been prejudiced by this importation of personal knowledge.

Held (dismissing plaintiff's appeal):

(1) The circumstances in which it is open to an appellate court to reverse findings of a trial judge based on credibility of witnesses who have given evidence at the trial are limited. But, when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it was then the duty of the appellate court to intervene and correct the error. Herein, this court was fully satisfied that the learned SCJ as the trier of fact, had taken the audio visual advantage reserved to him and had properly evaluated the whole body of evidence adduced before him and had drawn the proper references wholly consistent with the contemporary documents produced during the trial. In the circumstances, it was not open to this court to intervene and upset the findings. (paras 7 & 8)

(2) The SCJ had categorically stated in his grounds of judgment that his personal knowledge that the PPC Quarters was located on the left hand side of the road had no bearing on his decision. This court did not consider the matter was within the personal knowledge of the SCJ but a common knowledge. In fact whether the PPC Quarters was located on the right hand side or left hand side of the road as one proceeded towards Butterworth as shown in the sketch plan was common knowledge to all and sundry. A judge in the general exercise of his judicial function was entitled to rely on what was common and public knowledge. The location of the PPC

A Quarters was public knowledge. It was wrong to suggest that it was within the personal knowledge of the SCJ only. The plaintiff was not prejudiced when he himself was present at the scene and in fact given an opportunity to explain his evidence. This explanation was clearly not accepted by the
B court as both counsels opined it was clearly 'too late in the day.' The plaintiff's argument on prejudice was without any merit. There was no sufficient reason to interfere with the decision of the SCJ in dismissing plaintiff's claim. (para 11)

C **Case(s) referred to:**
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 2 MLJ 165 ***(refd)***
Chua Chong Cher v. Teo Lang Keow & Ors [1970] 2 MLJ 27 ***(refd)***
Clarke v. Edinburgh & District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***
Datuk Joginder Singh Ors v. Tara Rajaratnam [1986] 1 MLJ 105 ***(refd)***
Heller Factoring Sdn Bhd v. Metalco Industries (M) Sdn Bhd [1995] 3 CLJ
D *9 CA* ***(refd)***
Noorianti Zainol Abidin & Ors v. Tang Lai Nge [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 HC ***(refd)***
Tabarani Mohd Arsad & Anor v. Chan Tenn Yen [1999] 3 CLJ 188 HC ***(refd)***
E *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 2 CLJ 146 SC* ***(refd)***

Other source(s) referred to:
Sarkar on Evidence, 15th edn, p 99

F *For the appellant/plaintiff - Pyara Singh; M/s Andrew Paul Assoc*
For the respondent/defendant - Khoo Boon Yen; M/s Tay Chai Huat & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Balia Yusof Wahi J:

[1] This is an appeal by the plaintiff (appellant) against the
H decision of the learned Sessions Court Judge (SCJ) dismissing his claim with cost. The plaintiff's claim arose from a road accident on 28 November 1999 at about 10.15pm along Jalan Bagan Ajam, Butterworth involving a motorcycle ridden by him and a motor car driven by the defendant (respondent). According to the plaintiff's
I version, he was riding his motorcycle heading towards Butterworth

intending to go to his friend's house at the PPC Quarters. Upon reaching Jalan Bagan Ajam he slowed down his motorcycle and rode to the right towards the centre of the road. Suddenly a car knocked into the rear of his motorcycle and he fell. After falling down, another car coming from the opposite direction knocked him from his back. He blacked out and realized later that he was in hospital. About three months later he lodged a police report.

[2] SP1, an investigating officer from the IPD Butterworth gave evidence as to the damages on the motorcycle and the car. The only damage to the car was a broken front number plate while the motorcycle's rear number plate was slightly broken and the front left windshield was broken. SP1 confirms a third vehicle was involved in the accident but no report was ever lodged.

[3] The defendant gave evidence to the effect that at the time of the accident it was raining and while driving his car he saw an object on the road and despite braking, he ran over the object which later turned out to be a crash helmet. The defendant denies knocking into the plaintiff's motorcycle. Immediately after the accident the defendant lodged a police report among others stating: "tiba-tiba saya nampak sebuah motosikal nombor tidak tahu telah berada ditengah-tengah jalan dan pada masa yang sama saya ternampak sesuatu benda di atas jalan di hadapan motokar saya. Saya cuba memberek tetapi terlanggar juga oleh kerana jalan basah dan hujan renyai-renyai."

[4] The issue before the learned SCJ was simply which of the two conflicting versions of evidence given by the plaintiff and the defendant was more probable. He also confesses that the silent documentary evidence does not help much as it merely shows the damage to the motorcycle and the motorcar. However after considering the totality of the evidence and upon his observation of the witnesses, he concludes that the defendant's evidence was more probable. In his grounds of judgment, the learned SCJ states:

> Mahkamah telah melihat kedua-dua pihak memberi keterangan dan mahkamah telah diyakinkan bahawa defendan telah becakap benar bahawa beliau tidak melanggar plaintif dan plaintif sememangnya telah jatuh di atas jalan semasa beliau sampai di situ. Berlandaskan alasan-alasan tersebut mahkamah berpendapat versi pihak plaintif adalah 'inherently improbable'. Versi defendan lebih 'probable'. Plaintif telah gagal membuktikan kesnya terhadap defendan diatas pertimbangan kemungkinan.

[5] In so deciding, the learned SCJ has referred to the case of *Tabarani Mohd Arsad v. Chan Tenn Yen* [1999] 3 CLJ 188. A trial judge should not approach the case on the basis of deciding which story out of the conflicting stories that should be believed but rather to consider which version was inherently probable or improbable (see: *Nooriati bt Zainol Abidin & Ors v. Tang Lai Nge & Tang Lye Chang* [1990] 2 CLJ 545; [1990] 1 CLJ 943, *Chua Chong Cher v. Teo Lang Keow & Ors* [1970] 2 MLJ 27).

[6] On the methodology of assessing a witness' evidence, I can do no better than quote the following passages from *Sarkar on Evidence,* 15th edn, p 99.

> The Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor is any such rule possible for the proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the functions of a jury in England, has to weigh and decide (per Birch J, in *R v. Madhub*, 21 WR Cr 13, 19; *Mahendrapal v. State* AIR [1955] at 238:
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> Neither the evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. The question depends upon so many circumstances that it is impossible to lay down hard and fast rules. The law has left it to the court to decide whether the evidence should be believed or not and, if believed, what weight should be attached to it or what effect should be given to it. These matters have been left at the sound discretion of the court, it is not open to the highest court to fetter the discretion by laying down hard and fast rules, because it would be tantamount to legislating (*Jwala v. State*, AIR [1964] All 161 FB).

[7] As a trial judge, the learned SCJ has the advantage of seeing and hearing the witnesses and has made his own assessments of those witnesses. It is beyond the powers of this court in its appellate capacity to interfere with his finding. At this juncture perhaps it is advisable that I refer to the principles of appellate intervention which has been laid out by the Supreme Court in the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn. Bhd* [1993] 2 CLJ 146 at pp. 148 and 149 in the following terms:

As regards the principles on which an appellate court may interfere with a lower court's findings of fact we would refer to the following passage in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* in which his Lordship stated as follows:

There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582 at p 587:

I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witness, could not be sufficient to explain or justify the trial judge's conclusion.

II The appellate court may take the view that, without having seen or heard the witness, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the mater will then ... at large for the appellate court.

Again, as stated by Lord Shaw in *Clarke v. Edinburgh & District Tramways Co. Ltd* [1919] SC (HL) 35 at p. 37:

When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight or their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witness, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any

A conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus
B psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I, who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the judge who heard and tried the case, in a position, not
C having those privileges to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong then it appears to me to be my duty to defer to his judgment.

D The circumstances in which it is open to an appellate court to reverse findings of a trial judge based on credibility of witnesses who have given evidence at the trial are limited. But, when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial
E and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is then the duty of the appellate court to intervene and correct the error (See: *Heller Factoring Sdn. Bhd v. Metalco Industries (M) Sdn. Bhd* [1995] 3 CLJ 9. *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 2
F MLJ 165).

[8] After carefully scrutinizing the grounds of judgment, I am fully satisfied that the learned SCJ as the trier of fact, has taken the audio visual advantage reserved to him and I am equally
G satisfied that he had properly evaluated the whole body of evidence adduced before him and had drawn the proper references wholly consistent with the contemporary documents produced during the trial. In the circumstances, it is not open to me to intervene and upset his findings.

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[9] The main ground of complaint by the plaintiff in this appeal is that the learned SCJ has imparted his own knowledge regarding a certain fact in the matter, namely, the location of the PPC Quarters. In his evidence, SP2 stated that he was going to his
I friend's house at the PPC Quarters which was on the right side

of the road as shown in the sketch plan. (exh. P1) At the end of submissions by both the plaintiff's and the defendant's counsel, the learned SCJ drew to the attention of both counsels that he knows for a fact that the PPC Quarters is located on the left hand side of the road as shown in the sketch plan and not on the right as stated by both SP1 and SP2 in their evidence. Following that, the learned SCJ suggested to all parties concerned that they visit the scene. Both parties agreed and that was in the morning of 14 March 2003. Both the plaintiff and the defendant were not able to be present together and the learned SCJ decided to visit the scene only with both counsels, an interpreter and a process server at about 3pm on the same day. According to the notes of evidence at p. 55 of the appeal record, the court determines that the PPC Quarters was on the left hand side of the road. The court then was adjourned to 17 March 2003 at 2pm and at the scene of the accident, the plaintiff gave an explanation regarding his evidence on the location of the PPC Quarters. He admitted that he does not know the location but was only informed by his friend. The learned SCJ then informed and made clear to both counsels for the plaintiff and the defendant that the purpose of the visit was only to ascertain the location of the PPC Quarters. He then enquired from counsels whether in the light of the plaintiff's explanation, his action of turning towards the right side of the road at the time just moments before the accident can be considered at that stage of the proceedings. To this, the plaintiff's counsel replied and I quote: "It is too late the day" and the defendant's counsel agreed. The learned SCJ then adjourned the case to 31 March 2003 for decision.

[10] In his grounds of judgment, the learned SCJ mentioned the sequence of events that I have narrated above and on his knowledge of the location of the PPC Quarters he categorically stated that "walau apa pun pengetahuan peribadi saya ini tidak langsung diambilkira semasa saya membuat keputusan kes ini". In fact he was also candid enough to also mention in his grounds of judgment, that after having delivered his decision he called SP1 into his chambers and SP1 admitted that he did not know the location of the PPC Quarters but merely repeated what the plaintiff said.

[11] Learned counsel for the plaintiff now contends that the trial judge should decide the matter on the evidence of witnesses tendered in court and not on his personal knowledge. Counsel further contends that the plaintiff has been prejudiced by this importation of personal knowledge. With the greatest of respect, I do not think I can agree with this line of submissions. In the first place, the learned SCJ has categorically stated in his grounds of judgment that, that knowledge of his has no bearing in his decision. Secondly, it is also very clear that all parties agreed that whatever explanation by the plaintiff as to his action on the day of the accident is of no consequence wherein both counsels for the plaintiff and the defendant agreed that "it is too late the day" suggesting that whatever explanation or extra evidence given by the plaintiff at the scene is of no consequence and/or of no evidential value. Further, I do not consider the matter is within the personal knowledge of the learned SCJ but a common knowledge. In fact whether the PPC Quarters is located on the right hand side or left hand side of the road as one proceeds towards Butterworth as shown in the sketch plan is common knowledge to all and sundry. A judge in the general exercise of his judicial function is entitled to rely on what is common and public knowledge (See: *Datuk Joginder Singh Ors v. Tara Rajaratnam* [1986] 1 MLJ 105). Surely the location of the PPC Quarters here is a public knowledge. It is a public place. It is wrong to suggest that it is within the personal knowledge of the learned SCJ only. I do not see how the plaintiff is prejudiced when he himself was present at the scene and in fact given an opportunity to explain his evidence. This explanation was clearly not accepted by the court as both counsels opined it is clearly "too late the day". I find the plaintiff's argument on prejudice to be without any merit. In the same vein I also find the act of the learned SCJ summoning SP1 to his chambers after the conclusion of the case has not prejudiced the plaintiff. By that time, the matter had already been decided and judgment pronounced. However, let it be known that such action is totally unwarranted and uncalled for. It serves no purpose at all and instead gives rise to speculation and creates suspicion. It is paramount that justice must not only be done but must be seen to be done.

[12] In conclusion, having considered the matter in its entirety, I find no sufficient reason to interfere with the decision of the learned SCJ in dismissing the plaintiff's claim and accordingly the plaintiff's appeal against that decision is hereby dismissed with costs.

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